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***'Sir Frederick Jordan: Fire Under the Frost',  
Keith Mason, Federation Press, Sydney, 2019***

J. C. Campbell

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Sir Frederick Jordan: Fire Under the Frost

Keith Mason Federation Press Sydney 2019

J C Campbell<sup>1</sup>

Sir Frederick Jordan is indisputably amongst the finest judges that Australia has produced. This biography, coming nearly seventy years after his death, admirably fills a significant gap in the literature of Australian legal and social history.

When I was a newly admitted barrister in the mid-1970s Sir Frederick was one of a collection of monster judges about whom older barristers told stories – he was Frigidaire Freddy, who could be counted on for a few well-frozen words; he was the man who a judge's associate told that her judge had died in chambers while waiting for jury to return, and whose reaction was to reach for a practice book, and then tell the associate "You may take the verdict". His admirably concise writing, whether in the law school lecture notes that he wrote and that circulated widely at the bar, or in the few sentences from his judgments that would be quoted by later judges, did nothing to dispel the impression of cold precision.

This book enables Jordan to be seen as a more rounded figure, and as a man in his social context. It draws upon Jordan's judgments and other published writings, published and unpublished recollections and the author's own interviews of people who knew Jordan, contemporary newspaper accounts (located by that invaluable online tool for Australian historical research, *Trove*), and papers at the Mitchell Library and State Archives in Sydney and the National Archives in the UK, as well as numerous published books and articles on historical events in which Jordan had a role.

The book is structured by following through first one theme in Jordan's life, then another theme, then another. This has the effect that sometimes a fact or story is repeated or is alluded to again, but that is because it is relevant to more than one theme. This review can give only an incomplete account of some of the themes that the book discusses.

It traces his rise from somewhat modest circumstances to comfortable prosperity. His childhood was in Balmain, the only child of a couple who ran a small business, not profitable enough to pay Jordan's university fees, but profitable enough to result in his eventually inheriting eight properties from them. After high school Jordan worked in the public service for 8 years, from 1898 to 1906. He studied part-time at University during the years 1901 – 1906, graduating in Arts with honours in French and Latin, and in Law with second class honours. He went to the bar in 1907, and lectured in Equity at the Sydney University Law School in the period 1911 – 21, while developing a successful equity junior's practice. He lived in his father's house until he married in 1928, aged 46, a couple of months before he took silk. Though his wife was still in her mid 30s when they married, they had no children. The Governor, Baron Wakehurst, later described Lady Jordan as "guilelessly indiscreet".

Jordan's success at the bar enabled him to commission construction in 1935 of a large modern house in Vacluse, that is now the British Consulate, and resulted in him coming to control some 20 cottages, held in a manner to minimise taxation.

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<sup>1</sup> Hon J C Campbell QC FAAL is a former Judge of the NSW Court of Appeal, and is an Adjunct Professor at the University of Sydney Law School

He was appointed Chief Justice with effect from February 1934, and remained in office until his death in 1949. In 1940 he rejected an appointment to the High Court, in circumstances that the book explains.

The book shows Jordan as a man for whom the law was the centre of his life, but by no means the whole of his life. As both a barrister and a judge he kept the law in its place by never taking work home. He was well versed in European languages and literature and art, and knew fine wine. He had an interest in religion, but only as a historical and sociological phenomenon. While he was a barrister was a member of some literary luncheon clubs, at which the conversation was required to be in French. He listened to classical music, and had friends who were artists, authors, and diplomats. He and his wife hosted dinner parties and receptions at their Vaucluse home. He had two long trips to Europe, from August 1926 to February 1928, and again for 8 months in 1932-3. His tastes were condescendingly patrician – he deplored modern art and literature, cinema, radio and crossword puzzles. To him *Lady Chatterley's Lover* was “the vulgarity of an inferior mind”. He had no interest in organised sport, though he fenced and swam regularly. He read voraciously, and had a fine non-legal library.

The Sydney of Jordan's day is described as being quite different to that of today. The population of the State was two-fifths what it is now. Trams ran down King Street and from the city to Watson's Bay. There was a serious housing shortage that compelled many married couples to live with the parents of one of them. Communism was seen as a real social threat. The book also contains snippets of diverting Sydney trivia, like that it was in 1992 that the Queen conferred the title whereby an Eastern suburbs racecourse became Royal Randwick.

The practice of the law is also shown as being quite different to today. The Supreme Court consisted of 8 judges upon Jordan's appointment (two designated as judges in Equity), and jury trial of common law actions was universal. The court had no Divisions, and no Court of Appeal. The Court sat in the King Street premises, which were in poor repair. Written submissions were unheard of in any type of litigation, except in the Privy Council. It was a time when divorce law was administered in the Supreme Court, and required proof of fault, with adultery (often proved by a “divorce raid”) being required to be proved to the criminal standard. In criminal trials unsworn statements from the dock were routinely made, and, well before the days of routine recording of police questioning, evidence was regularly given of confessions that an accused was said to have made orally in the police station. Victim impact statements were unheard of. The *Habitual Criminals Act 1905 (NSW)* allowed repeat offenders to be jailed at the Governor's pleasure. Sentencing was very much the province of the trial judge exercising an “instinctive synthesis”, rather than applying any sentencing guidelines or principles or statistics. Criminal appeals were shorter and less numerous than now – they were heard on just one day a week. A criminal appeal would be concluded within weeks of the trial. Reserved judgements in sentencing appeals were rare.

Jordan sat on common law and criminal trials (but not on equity trials), and on the full range of civil and criminal appeals. His judgments in appeals were usually ones in which his fellow judges concurred. He went on country circuits, travelling to them by train in his own carriage. He unfailingly sought to apply the law, even if that meant the acquittal of a villain who had been charged with an offence that was not the most appropriate one for the facts, the striking down of invalid legislation or regulations, or the criticism of police who had stepped outside the law. He made a particular contribution to the common law of evidence and procedure, even though his practice at the bar had been strongly weighted to equity.

His approach to judgement writing was that the role of the judge was not merely to decide the instant dispute in as confined away as possible, with reasoning honed down by Occam's razor. Rather, his judgments were educative, and a means of revealing, and sometimes imposing, coherent principle as operating within an area of the law. They expounded the principles relevant to the general areas of law upon which the instant dispute depended, so that it could be placed within the relevant conceptual landscape. His method of expounding the principles was distinctive: a succession of propositions, each usually short, and each supported by citation of authority. Regularly he traced the history of the development of the case law and statute law that bore on the topic. And, as Hon Dennis Mahoney AO QC said, "Jordan was the first judge who tried to systematise the law in judgements" – his synthesis of principles, even when not always supported by the cases cited, made the structure of the law relating to a topic clear. The creative intelligence and depth of learning involved in writing in this way explains the High Court's repeated verbatim adoption of statements of principle that Jordan made. Of particular interest to lawyers, but incapable of easy summary, is an assessment of the ongoing significance of Jordan's contributions across virtually the full breadth of the law.

Different periods of time and historical circumstances bring their own topics for litigation. During the Second World War in New South Wales, alone of the Australian states, there were repeated challenges to the validity of regulations that were supposedly justified as wartime measures. This is explained as happening because of the willingness of Barwick KC as advocate to raise such issues, and of Jordan CJ to decide them adversely to the government. The frequency of Jordan's striking down of such regulations caused the wartime Premier to describe him as "living in an ivory tower oblivious to the problems and dangers arising from a country at war". Jordan was unmoved – he applied the law as he understood it.

But his judgments on wartime regulations were no mere exercise in cold analysis. Like many of his judgments on other topics, they contain rhetoric, sometimes almost journalistically coloured accounts of facts, scathing criticism, and flashes of wit. He spoke of wartime regulations that "showered daily from the Government Printing Office"; one such regulation was "a windy generality which may mean anything and everything"; another was an "impractical unintelligible jumble"; another was "eminently calculated to leave the public in complete uncertainty ..."; another lacked any legislative or constitutional basis "which authorises the Executive Government to impose upon the people of Australia the status of villeinage". He described a nightclub as "an infamous sink of iniquity, frequented by soldiers as well as civilians, likely to be morally and physically deleterious to all who resorted to them".

The biography also fleshes out the political context in which Jordan acted. He was appointed as Chief Justice by the Conservative government that had come to power after the dismissal of Lang. During the first years of his office he was not Lieutenant Governor – Sir Phillip Street, the immediately preceding Chief Justice who had retired when nearing the compulsory retiring age for a judge, continued as Lieutenant-Governor until his death in September 1938. It was only then that Jordan became Lieutenant-Governor.

One particularly interesting episode concerns the circumstances in which Jordan was Acting Governor between June 1945 and July 1946, the Wakehurst-Northcott interregnum. There had been no Australian Governor of any Australian State before the end of World War II. The Labor Premier of NSW, William McKell, had long made clear that, in accordance with long-standing Labor Party policy, he wanted to appoint an Australian Governor of New South Wales upon the retirement of Lord Wakehurst. Lord Wakehurst and British bureaucrats plotted to prevent it, and to keep the Governor as a protector of British interests in the State. Upon Wakehurst's departure from NSW in June 1945

Jordan became Acting Governor, oblivious to the secret British plan that he should stay in the role until either the Australians came to their senses and agreed to the appointment of a British Governor, or McKell was defeated at the 1947 election. Eventually, the Brits realised that McKell was standing firm, and, after more failed manoeuvring to get a British appointment, agreed to the appointment of the (Australian) Lieutenant-General John Northcott. During the 14 months that he was Acting Governor Jordan continued to perform his full range of tasks as Chief Justice – indeed more, because there was an unfilled vacancy on the Supreme Court from October 1945 until late 1947. The effort broke his health, and contributed to his death aged 68 in 1949.

By the end of this book Sir Frederick remains cool and unexpansive, but his reserve is made more understandable. He is shown to have some close friendships and great breadth of interests, and his intellectual leadership, sheer hard work, and importance as a lawyer is confirmed in considerable detail.